

OGC 78-7394
3 November 1978

MEMORANDUM FOR: Acting Director, Policy Guidance Office
FROM :
Deputy General Counsel
SUBJECT : Input to DCI's Annual Report

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1. The following is a summary of activities during 1977 in certain areas which may be appropriate for inclusion in the DCI's 1978 Annual Report to the President and the Congress. Certain information, particularly that relating to legislation and congressional committee hearings, as well as issues of legality and propriety and legal protection against espionage and leaks, may overlap the reports of other offices such as Office of Legislative Counsel, the Office of the Inspector General, and the Office of Security. Since the Office of General Counsel and each of these other offices would comment on similar matters from different perspectives, I have deemed it preferable to make comments which may be in some respect redundant rather than possibly missing some issues.

Major Activities In General

2. The problem of protecting extremely sensitive classified information in the course of criminal prosecution or civil litigation continues to be at the forefront. It is most critical in the area of criminal prosecution because of the more often fatal effect of the need to withhold information in a criminal case. The ongoing ITT and Kampiles cases are near perfect examples of the two sides of this coin. The first signifying the difficulties of prosecuting for any offense where the defendant had some relationship with an intelligence agency; and the second, the quandary of the espionage defendant whose prosecution may require disclosure, elaboration, or confirmation of the very information the defendant is charged with disclosing or attempting to disclose to the injury of the United States. The problem, while more manageable in civil cases, still is a difficult one and has a great impact because of the sheer volume of civil cases as opposed to criminal.

3. The Office has been deeply involved and spent a great deal of lawyer time contributing to the two new Executive orders, 12036 on intelligence activities and 12065

on classification. The regulations, instructions and procedures required by these Orders are primarily the responsibility of this Office and will largely determine the effectiveness of the Orders and the ability of the Agency to continue to carry on its necessary operations under the limitations set by those Orders.

4. The discovery of new records on the previously disclosed drug experimentation programs has resulted in many months of planning the attempt to notify individuals and organizations who may have been involved. The question of relations with the academic community has also been in the forefront, with certain parts of that community invoking or imposing guidelines deemed unacceptable by the Agency or the Intelligence Community and resulting in negotiations and debate and a certain amount of public controversy. Charter legislation may have been the single most time-consuming activity for the Office, with the General Counsel chairing the Community task force. The initial Community work is nearly completed and there is reason to hope for an Administration position on specific legislation by the time of the convening of the next Congress. Dealings with the Attorney General and the Intelligence Oversight Board on questions of illegality and impropriety are continuing with matters reported to the Attorney General now exceeding those reported to the Board.

Reporting Questions of Legality or Propriety

5. There have been continuous activities and we believe effective relationships between the Agency and the Intelligence Oversight Board. The actual number of items reported to the Board on a regular basis has decreased considerably from the previous years, but this probably reflects primarily the fact that the previous years' reports include a fair amount of "catch-up" on newly discovered old matters where as most of 1978 concerns were new or current. The procedures for handling matters with the Board seem to be well established and the method of oversight working well. The Agency and the Department of Justice have agreed upon procedures for reporting possible criminal violations to the Attorney General. These procedures will be formalized shortly after being modified slightly to meet a congressional objection. In the meantime reports are being made by the Agency and acted upon by the Attorney General in accordance with the draft procedures.

Litigation

6. The amount of litigation continues at a high level and its thrust is largely unchanged. The greatest number

of cases is in the Freedom of Information and Privacy Act areas, followed by tort cases. Many of the latter arise from activities disclosed in previous years' investigations. We continue to prevail in disputes over withholding for reasons of classification or protection of sources and methods. Nevertheless, the cases are becoming more difficult because the plaintiffs have become more sophisticated and have, as we do, the advantage of case precedents to draw upon which did not exist before. There is an apparent increase in equal employment opportunity discrimination cases and although only one reached litigation, it seems likely that others will. This may be only one aspect of a greater willingness of employees to assert and contest their rights while still employed. There is every reason to think that this will continue. These are sensitive cases to handle inasmuch as there must be no appearance of reprisal while some may be cases where employees subject to adverse actions for valid reasons are seeking shelter by asserting questionable discrimination claims. A related type of case which seems to be on the increase threatens to lead to more litigation is that of the applicant who contests a refusal to hire.

Espionage, Leaks and Disclosure by Publication

7. There has been a proliferation of publication of books and articles by former employees. The review process frequently involves difficult and sometimes adversary negotiations with the authors. We are in a position to object to disclosure in these settings only on grounds of classification, so that we are powerless to prevent the publication of information that while unclassified may nevertheless be harmful to the extent that its disclosure causes sources and foreign liaison services to doubt our reliability. The legal remedies available in the cases of those authors who publish without submission or who are unwilling to accept deletions are inadequate to say the least. The Frank Snepp case if upheld on appeal will be a major victory and certainly may discourage publication by many who would otherwise do so, but it is by no means a totally effective remedy. There have been a number of proposals for improvements in the laws to offer greater protection to intelligence sources and methods but there is still great doubt that any effective remedy can be designed under our constitutional system. We will continue to work on this problem and believe that there is greater understanding than ever before in the legislative branch of the need to fashion some better remedies. We can hope for improvement but not perfection.

8. In the industrial security area, we have introduced new contract security clauses designed to make it easier to impose sanctions on contractors not meeting security standards and accordingly encouraging tighter standards.

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM

Deputy General Counsel

EXTENSION

NO.

DATE

TO: (Officer designation, room number, and building)

DATE

OFFICER'S
INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

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Policy Guidance Office

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